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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

BANGOR PUNTA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the part of the judgment of the United States Court of Appeals for the Second Circuit that affirmed the denial of injunctive relief sought by the Commission.

OPINIONS BELOW

The opinion of the court of appeals is set forth at pages H1—H124 of the joint appendices in Nos. 73-152—73-154[1] and is reported at ['72-'73 Decisions] CCH Fed. Sec. L. Rep. ¶ 93,816. The opinion of the district court is reported at 331 F. Supp. 1154 (J. App. C1-C18).

[1] No. 73-152, *The First Boston Corporation* v. *Chris-Craft Industries*; No. 73-153, *Bangor Punta Corporation, et al.* v. *Chris-Craft Industries*; No. 73-154, *Howard Piper, et al.* v. *Chris-Craft Industries*. The joint appendices are hereafter referred to as J. App.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on March 16, 1973, and a timely petition for rehearing and suggestion of rehearing *en banc* was denied on May 8, 1973 (App. B, *infra*). On August 6, 1973, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit by the Securities and Exchange Commission to enjoin violations of the antifraud provisions of the federal securities laws, the Commission is entitled to an injunction upon showing a serious violation of those laws, unless the defendant shows exceptional circumstances exist that would make an injunction inappropriate in the particular case.

STATUTES INVOLVED

Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b), provides in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(e), provides in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

STATEMENT

The Securities and Exchange Commission seeks review of a decision of the court of appeals that affirmed the denial of an injunction against a defendant found to have violated the antifraud provisions of the federal securities laws.

The Commission brought this action in the United States District Court for the Southern District of New York to enjoin respondent Bangor Punta Corporation ("Bangor Punta") from violating antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in connection with a 1969 contest between Bangor Punta and Chris-Craft Industries, Inc. ("Chris-Craft") for control of Piper Aircraft Corporation ("Piper"). Earlier in that contest, Bangor Punta announced a proposed offer for Piper stock through an exchange of its own stock when no registration statement was in effect for that exchange. The Commission sued and Bangor Punta con-

sented to an injunction which included a prohibition against implementing any exchange offers without complying with the registration provisions of the federal securities laws (J. App. H85). This same attempted stock exchange was subsequently held, in a private suit between Bangor Punta and Chris-Craft, to have violated the statutory registration provisions. That violation, the court stated, created "a danger that substantial numbers of investors were misled" and meant that "the public did not receive the detailed information it would have received" had Bangor Punta complied with the statute. *Chris-Craft Industries, Inc.* v. *Bangor Punta Corporation,* 426 F. 2d 569, 575 (C.A. 2).

On May 29, 1969, three days after the consent injunction was entered, Bangor Punta filed with the Commission a registration statement and prospectus for an offering of its securities in exchange for Piper stock. The prospectus showed that the Bangor and Aroostook Railroad, owned by Bangor Punta, was carried on its books at $18,400,000, based on a 1965 market appraisal. The statement did not disclose that a sale of this interest was then being negotiated at between $5 million and $7 million.[2]

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[2] Eight days before the filing of the registration statement, Bangor Punta's Board of Directors was told of an offer to pay $5 million for the railroad, and directed its representative to attempt to negotiate a sale at $7 million. The registration statement became effective on July 18, 1969: Bangor Punta obtained 51 percent of the outstanding Piper shares by September 5, 1969; the railroad was sold for $5 million on October 2, 1969 (J. App. C2, C10–C11; H18, H43–H45). This sale resulted in a $13,800,000 extraordinary loss, contributing to an $8,566,964 loss of net income for 1969

The Commission's complaint in the present action charged that Bangor Punta's registration statement and prospectus were false and misleading because they failed to disclose these negotiations; such disclosure would have afforded information relevant to the value of Bangor Punta stock. The district court agreed that Bangor Punta's registration statement contained misleading omissions of material fact in violation of antifraud provisions of the securities laws.[3] It nevertheless denied the Commission's request for an injunction, since it found that the omissions were "mere negligence" and that the defendant was "unintentionally in error." It concluded that the Commission had "failed to carry its burden to establish" that the defendant and its officials "have a propensity or natural inclination to violate the securities law" (J. App. C17). The court did direct Bangor Punta, however, to make an offer of rescission to Piper shareholders who had accepted the Bangor Punta exchange offer (J. App. C16).

A divided court of appeals affirmed the district court's denial of the injunction.[4] The court held that

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(J. App. H45). It represented a loss of $4.32 per share, an amount far exceeding the company's net income for any of the prior five years (J. App. C15).

[3] See Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10(b)-5, 17 C.F.R. 240.10b-5, promulgated thereunder.

[4] The court of appeals heard and decided the Commission's appeal together with appeals in two related private actions, growing out of the same contest for corporate control, *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corporation*, C.A. 2,

the failure to disclose "clearly was unreasonable" and demonstrated "reckless disregard for the import of [defendant's] activities," so that the district judge's refusal to award damages in the related private actions was erroneous (J. App. H48, H68–H69). The court ruled, however, that the district court had not abused its discretion in denying the injunction (J. App. H96–H100). It stated that "[t]he SEC has, through our decision in the companion cases now largely achieved its commendable purpose" (J. App. H100). Judge Mansfield, in his concurring opinion, stated (J. App. H123–H124) that he was "convinced that a judgment which (1) awards compensatory damages to CCI, (2) bars BPC from voting its illegally acquired Piper shares, and (3) awards rescission to former Piper stockholders who exchanged their shares in response to BPC's tender offer, amply protects the public interest and insures against any reasonable likelihood that BPC will engage in similar conduct in the future."

In his dissenting opinion on the injunction issue, Judge Timbers, characterizing Bangor Punta's omis-

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Docket No. 72–1064, and *Bangor Punta Corporation* v. *Chris-Craft Industries, Inc.*, C.A. 2, Docket No. 72–1120 and with a cross-appeal by Bangor Punta with respect to certain ancillary relief that was granted in the Commission's suit, C.A. 2, Docket No. 72–1140. The consolidated opinion in these cases was rendered by a panel of three judges, composed of Circuit Judges Mansfield and Timbers and Judge Gurfein of the United States District Court for the Southern District of New York. While Judge Timbers (J. App. H6–H95) wrote the opinion of the court on most aspects of the case, Judge Gurfein's opinion (J. App. H95–H100) is the court's opinion on this aspect of the case. Judge Timbers dissented on this aspect of the decision (J. App. H78–H89).

sions from its registration statement and prospectus as "violations of the securities laws of the most flagrant character" (J. App. H84), concluded that the district court had applied an erroneous standard in requiring the Commission to show that the defendant had a "propensity or natural inclination" to violate the securities laws (J. App. H79–H80). He also stated (J. App. H82) that "the district court totally failed to recognize that an injunction in an SEC enforcement proceeding is sought to protect public rather than private interests." Finally, he concluded (J. App. H89) that the majority decision denying injunctive relief "will cause mischief in the enforcement of the federal securities laws," because it "undercuts the strong policy of this Court of encouraging vigorous enforcement of the securities laws," and will have an "impact beyond this Circuit, since other courts look to us for guidance in this area." He stated (*ibid.*):

> In my view, no decision during the four decades the federal securities laws have been on the books will more effectively cripple the salutory enforcement program of the Securities and Exchange Commission than today's 2–1 decision by the majority of this panel on this issue.

The court of appeals denied the commission's petition for a rehearing *en banc*, with Judges Hays, Oakes and Timbers dissenting.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the ability of the Securities and Exchange Commission effectively to protect the public by enforcing the antifraud provisions of the federal securities laws.

A major part of the Commission's enforcement activities is the obtaining of injunctions against such violations. As Judge Timbers stated in his dissenting opinion on this issue, the decision of the court of appeals "undercuts the strong policy of this Court of encouraging vigorous enforcement of the securities laws" and will "effectively cripple the salutory enforcement program of the Securities and Exchange Commission * * *" (J. App. H89).

Prior to the decision of the court of appeals in this case, it was generally accepted that the Commission has made the statutory "proper showing" for injunctive relief [6] when it proves that the defendant has committed a significant violation of the federal securities laws.[7] The

[6] See, *e.g.*, *Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1100 (C.A. 2); *Securities and Exchange Commission* v. *First American Bank and Trust Co.* [current binder], CCH Fed. Sec. L. Rep. ¶ 94,031 at p. 94,153 (C.A. 8, Nos. 72-1306 and 72-1313); *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, 470 F. 2d 40, 53 (C.A. 7); *Securities and Exchange Commission* v. *Keller Corporation*, 323 F. 2d 397, 402 (C.A. 7). See also *Tanzer* v. *Huffines*, 408 F. 2d 42, 43, n. 1 (C.A. 3).

[7] See, *e.g.*, *Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.*, *supra*, 458 F. 2d at 1100; *Securities and Exchange Commission v. First American Bank and Trust Co.*, *supra* [current binder], CCH Fed. Sec. L. Rep. ¶ 94,031 at p. 94,153; *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, *supra*, 470 F. 2d at 53; *Securities and Exchange Commission* v. *Keller Corporation*, *supra*, 323 F. 2d at 402. Cf., *Tanzer* v. *Huffines*, *supra*, 408 F. 2d at 43, n. 1.

This is true even though a defendant has ceased its illegal activities prior to institution of the injunctive action. *Securities and Exchange Commission* v. *Keller Corporation*, *supra*, 323

court of appeals, by upholding the district court's denial of an injunction because the Commission had not shown that the defendant had a "propensity or natural inclination" to violate those laws, has significantly departed from and undercut the previous standard governing the issuance of injunctions in such cases. It has subjected the agency to a requirement that would seriously lessen the availability and hence the effectiveness of Commission injunctions as a major tool for protecting public investors against securities frauds.

The hitherto prevailing rule that an injunction ordinarily should issue when the Commission shows a significant violation of the antifraud provisions reflects the obvious fact that the mere commission of such a violation necessarily creates a significant danger of repetition so that the public is entitled to protection against further offenses by the violator. "[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief" (*Hecht Co.* v. *Bowles,* 321 U.S. 321, 331).[8] The public would not be adequately protected if

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F. 2d at 402. See also, *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 327; *Securities and Exchange Commission* v. *Okin*, 139 F. 2d 87, 88 (C.A. 2); *Securities and Exchange Commission* v. *Universal Service Ass'n*, 106 F. 2d 232, 239–240 (C.A. 7), certiorari denied, 308 U.S. 622; and *Otis & Co.* v. *Securities and Exchange Commission*, 106 F. 2d 579, 583–584 (C.A. 6).

[8] This Court has emphasized that a "suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323. The Court there also noted that "it is well settled that once the Government has suc-

the Commission were required to keep such violators under surveillance and to institute another action if it discovers that they have repeated or resumed their illegal activities.[9]

The court of appeals viewed this case as involving only the question whether the district court had abused its discretion in denying an injunction. In affirming the denial it purported to apply the standard announced in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, that the party seeking an injunction must show that "there exists some cognizable danger of recurrent violation." If that standard governs the issuance of injunctions in Commission actions under the

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cessfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." 366 U.S. at 334 (footnote omitted). Similarly this Court has stated that "[t]he courts have an obligation, once a violation * * * has been established, to protect the public from a continuation of the harmful and unlawful activities." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48.

[9] *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 250 (C.A. 2). See also *Securities and Exchange Commission* v. *Manor Nursing Centers, Inc.*, *supra*, 458 F. 2d at 1101; and *Securities and Exchange Commission* v. *MacElvain*, 299 F. Supp. 1352, 1354 (M.D. Ala.), affirmed, 417 F. 2d 1134 (C.A. 5), certiorari denied, 397 U.S. 972.

As the Court of Appeals for the Fifth Circuit noted in an analogous context,

"[I]njunctions should [not] be issued freely, without regard for the facts, simply because it is the Government asking for the injunction * * * [but] the manifest difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction—*after* the court has found an unquestionable violation of the Act."

Mitchell v. *Pidcock*, 299 F. 2d 281, 287 (emphasis in original).

antifraud provisions of the securities laws, the answer, as shown above, is that in this area of the law proof of a significant violation itself establishes a "cognizable danger of recurrent violation" which requires that the public be protected through an injunction.

In this case the violation found was characterized by the majority as reflecting "reckless disregard" by the defendant for the consequences of its own conduct and by the dissent as of "the most flagrant character." Under the prior standard, in such circumstances the Commission would have been entitled to an injunction. Indeed, under the prior standard this case would have been *a fortiori* for the issuance of an injunction, since Bangor Punta had violated the registration provisions of the securities laws shortly before it committed the violations on which the Commission's present suit was based. In upholding the denial of an injunction, the court of appeals thus necessarily has applied and approved a new and significantly weaker standard for protecting the public. In evaluating the significance of the court of appeals' decision, it is, of course, the result reached rather than the language used that controls. Cf. *Securities and Exchange Commission* v. *Capital Gains Research Bureau,* 375 U.S. 180, 185, n. 6.[10]

[10] There this Court noted that the court of appeals had purported to recognize that the federal securities laws are to be construed broadly to effectuate their remedial purposes, but had, nevertheless, by affirming the district court's " 'technical construction of the * * * Act * * * and by requiring proof of 'misstatements,' unsound advice, bribery, or intent to unload 'worthless stock.' * * * read the statute, in effect, as confined by traditional common-law concepts of fraud and deceit."

The court of appeals suggested that one consideration justifying the denial of an injunction was that significant relief had been provided for the victims of Bangor Punta's illegal conduct in the companion private action and by the offer of recision Bangor Punta is required to make. But the relief given in a private suit is not an adequate substitute for an injunction in a government suit. "The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive" (*United States* v. *Borden Co.*, 347 U.S. 514, 518; see *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432). Moreover, the relief the court granted here to the private parties would redress only the past injuries the victims of this particular violation had thereby suffered. It would not protect other members of the public against other violations that Bangor Punta may commit in the future. The other relief the court here awarded is not an adequate substitute for a Commission injunction. Such relief does not come even close to establishing the exceptional circumstances that must justify the denial of injunctive relief in a case where,

as here, there have been serious violations of the anti-fraud provisions of the federal securities laws.

In sum, this decision marks a sharp break with the past standards and practices governing injunctions in Commission enforcement actions. If permitted to stand, it will make it far more difficult for the Commission adequately to protect the public against securities frauds.[11] The effect of this decision by the Second Circuit will be particularly serious because a substantial portion of the Commission's enforcement actions are brought in federal courts in the New York City area, which is the center of the nation's financial and commercial communities. A decision that portends such serious adverse consequences for the nation's public investors warrants review by this Court.

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[11] One commentator has already suggested that the instant decision has imposed a heavier burden of proof on the Commission. See Mathews, *SEC Civil Injunctive Actions*, 5 Review of Securities Regulation, Part II, pp. 949, 950 (1972).

Similar allegations have been made by defendants in *Securities and Exchange Commission* v. *Radio Hill Mines Co., Ltd.* [current binder] CCH Fed. Sec. L. Rep. ¶93,974 at pp. 93,905–93,906 (S.D.N.Y.); *Securities and Exchange Commission* v. *Allegheny Beverage Corporation* (D. D.C., Civ. No. 932–73); and *Securities and Exchange Commission* v. *Shapiro* (C.A. 2, Doc. No. 72–1927).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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LAWRENCE E. NERHEIM,
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Securities and Exchange Commission.

AUGUST 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March one thousand nine hundred and seventy-three.

Present: Hon. Walter R. Mansfield. Hon. William H. Timbers, Circuit Judges. Hon. Murray I. Gurfein, District Judge.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APELLANT

v.

BANGOR PUNTA CORPORATION, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as modified and that the actions be and they hereby are remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

UNITED STATES COURT HOUSE, SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the 8th day of May, one thousand nine hundred and seventy-three.

Docket No. 72–1053, 72–1064, 72–1120, 72–1140

Present: Hon. Walter R. Mansfield. Hon. William H. Timbers, Hon. Murray I. Gurfein, Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APELLANT

v.

BANGOR PUNTA CORPORATION, DEFENDANT-APPELLANT

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of May, one thousand nine hundred and seventy-three.

Docket No. 72–1053

SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF-APPELLANT

v.

BANGOR PUNTA CORPORATION,
DEFENDANT-APPELLANT

A petition for a rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the appellant, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judges Hays, Oakes and Timbers dissent.

HENRY J. FRIENDLY,
Chief Judge.

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